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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1310

LEE EDWARDS,
Petitioner,

vs.

LEM C. BRYAN, Receiver for Arkansas Loan and Thrift Corporation,
Respondent,

HOYT BORUM, AFTON BORUM, E. M. CLEM, GAYLORD B. ROBERSON, PAUL A. MITCHLER, RALPH C. INGRAM, ERNEST A. BARTLETT, JR., JOE D. JERYO, and CHARLES R. GARNER, Parties to Original District Court Action, and Parties to Companion Cases in Circuit Court of Appeals for the Eighth Circuit, Consolidated Therein for Trial,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT, GARNER, IN SUPPORT

OPINIONS BELOW

The opinions below are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Whether the holding of the Court of Appeals for the Eighth Circuit that "federal common law" or "federal rules of decision" should be applied to this case is inconsistent with the decisions of other Courts of Appeals and this Court.

Whether Arkansas law, if applicable, affords petitioner and respondents, other than Bryan, a defense where the note involved is conceded to be without consideration.

STATUTES INVOLVED

These are adequately set forth in the petition but this respondent would add:

28 U. S. Code Sec. 1254.

STATEMENT OF THE CASE

The facts set forth in the petition are adequate to acquaint the Court with the circumstances of this litigation. This respondent would add that the Court of Appeals treated him, although in the capacity of an attorney to the corporations, with the same fiduciary duty as the other directors and thus estopped to assert all defenses denied the directors. App. 30a.

ARGUMENT

The Court of Appeals for the Eighth Circuit in Deciding That the "Federal Common Law" or "Federal Rules of Decision" Should Govern a State Created Interest, or Right, Growing Out of a General Equity Receivership in Federal Court Is Inconsistent with Decisions of the Second and Ninth Circuits and This Court.

A. Applicable Law.

The Eighth Circuit misapprehended the law in failing to distinguish the present case concerning state created rights under a general equity receivership instituted in Federal Court from a case where the receivership originates by reason of a federal statute to protect a Federal interest. The Securities and Exchange Act of 1933 does not provide for appointment of a receiver and this receivership rests upon the general equitable jurisdiction of the Federal Court. It is not one arising as a Federal statutory receivership. Even though jurisdiction is not based upon diversity of citizenship this does not mean that Federal common law is to be applied to the exclusion of the forum state's law where private rights are involved.

The Second Circuit stated this position in *Austrian* v. *Williams*, (CA 2 1952) 198 F. 2d 697, cert. den. 340 U.S. 909 (1952) as follows:

> "The fact that diversity jurisdiction is lacking does not, alone, preclude a result of that which could be reached if there were such jurisdiction. Though it may be true that the rationale of *Guaranty Trust Co.* v. *York*, 326 U.S. 29 (1945) and *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938) is inapplicable where a federal interest is involved, *D'Oench, Duhme & Co.* v. *F.D.I.C.*, 315 U.S. 447; *Clearfield Trust Co.* v. *U. S.*, 318 U.S. 363. . . . There may be other reasons to support, or require, the same result."

The "other reason" given in *Austrian, supra,* supporting the use of the forum state's law was the right to use the state's statute of limitations as a defense in a bankruptcy trustee's claim.

Likewise, in the present case, the "other reason" supporting the application of state law is a state created right to assert the defense of lack of consideration which is established as a valid defense under the law of Arkansas to an accommodation maker or endorser on a note where an equity receiver brings suit on a note of an insolvent bank. *Jordan* v. *Harris*, 98 Ark. 200, 135 S. W. 830 (1911).

It was conceded during the trial and on appeal that no consideration existed for the execution of the promissory note that provides the basis for the asserted liability of petitioner and respondents, except Bryan.

Further, in the absence of consideration and in the absence of misrepresentation by receiver's predecessor and reliance thereon Arkansas law would not estop petitioner and respondents, except Bryan, from raising lack of consideration as a defense on the note. *Traylor* v. *Farmers Bank & Trust Co.*, 196 Ark. 161, 116 S. W. 2d 590 (1938).

Thus, under Arkansas law, the defense is available to petitioner and respondents, except Bryan, and it is urged that this is the applicable law.

This Court in *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156 (1946) in Justice Frankfurter's concurrence said:

> ". . . a claim implies the existence of an obligation created by state law. If there was no valid claim before bankruptcy, there is no claim for bankruptcy to recognize or to reject.

> Where a transaction in its entirety occurs in one state, it is clearly the law of that state that determines if an obligation is born whether the question becomes relevant in bankruptcy court or in any other court."

B. Consequences.

If the decision of the Eighth Circuit stands the receiver will be put in a better position than was his predecessor since the predecessor corporation was subject to the defense of lack of consideration.

This position is untenable in view of *Vanston, supra,* and the decision of the Ninth Circuit in *Equitable Trust Co.* v. *Great Shoshone & TFWP Co.*, 245 Fed. 697. There it was said:

> ". . . the appointment of a receiver of the property by a federal court is for the protection and preservation of all rights and interests therein existing at the time of the appointment."

By the terms of the appointment, App. 3a, the receiver could have sued in either state or federal court. Under the decision of the Eighth Circuit the receiver's decision to sue in Federal court has elicited a decision exactly opposite that which would have been predictably reached if he had sued in state court. In addition to undermining uniformity of results this decision placed the existence of state created rights at the very whim of the receiver.

CONCLUSION

The decision of the Eighth Circuit should be reviewed in this Court and the petition for certiorari should be granted.

Respectfully submitted,

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